

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAARNOLD AGUIRRE,
Plaintiff,

No. C 09-763 MHP (pr)

ORDER

v.

V. MUNK, D.D.S.; et al.,
Defendants.

On June 1, 2011, Judgment was entered "against plaintiff and in favor of all defendant except defendant nurse Moses, who is dismissed without prejudice." (Docket # 73.) In the Order Granting Defendants' Motion For Summary Judgment that was filed on the same date, the court explained that nurse Moses was dismissed because, in the 2+ years the action had been pending, plaintiff had provided nowhere near enough information to find and serve this defendant. "Nurse Moses is dismissed without prejudice because he was not served within 120 days after the complaint was filed. See Fed. R. Civ. P. 4(m). Plaintiff may file a new action against nurse Moses if he ever figures out his real full name and finds him." Order Granting Defendants' Motion For Summary Judgment, p. 21.


Plaintiff thereafter filed a notice of appeal, then filed a motion to proceed *in forma pauperis* on appeal, and later filed a motion for leave to file a second amended complaint.

Plaintiff's motion to proceed *in forma pauperis* on appeal is GRANTED. (Docket # 77.)

1 The existence of the pending appeal divests this court of jurisdiction over those
2 aspects of the case involved in the appeal, however. See Griggs v. Provident Consumer
3 Discount Co., 459 U.S. 56, 58 (1982) (it is "generally understood that a federal district court
4 and a federal court of appeals should not attempt to assert jurisdiction over a case
5 simultaneously"); Pope v. Savings Bank of Puget Sound, 850 F.2d 1345, 1347 (9th Cir.
6 1988). Plaintiff's motion to amend (docket # 78) therefore is DENIED without prejudice to
7 him filing a new motion after the Ninth Circuit Court of Appeal issues its decision in the
8 pending appeal. Plaintiff is reminded, however, that the court's earlier ruling was that
9 plaintiff could file *a new action* against nurse Moses, not amend his pleading in this action, if
10 he ever found that person.

11 IT IS SO ORDERED.

12 Dated: September 8, 2011


Marilyn Hall Patel
United States District Judge